

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

**FILE:**

B-220033

**DATE:** December 6, 1985**MATTER OF:**

Aerojet Techsystems Company

**DIGEST:**

1. Bid which offered prices for option quantities for Fiscal Year (FY) 1987 conditioned on the exercise of quantities in the FY 1986 option year was responsive since the only reasonable interpretation of the solicitation was that the agency intended to exercise FY 1986 option quantities as a prerequisite to the exercise of FY 1987 option quantities.
2. Where bidder crosses out line item under bid schedule with notation indicating item was deleted because of a specific amendment, but bidder acknowledges subsequent amendment reinstating item, only reasonable interpretation of bid is that bidder is bound by the subsequent amendment to supply item.
3. GAO will not consider protest by interested party where protest was untimely submitted as part of comments on agency report concerning protest of another bidder.
4. Invitation for bids (IFB) for Navy mines may be canceled after bid opening where agency learns that manufacturer of specific battery power unit component required under IFB is having production difficulties and that the battery may not perform properly.

Aerojet Techsystems Company (Aerojet) protests the rejection of its bid as nonresponsive under solicitation No. N00024-84-B-6287, a two-step, formally advertised procurement conducted by the Naval Sea Systems Command

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(Navy) for the purchase of a quantity of MK 65 Quickstrike Mine (MK 65) components.<sup>1/</sup>

Also, Gould Defense Systems, Inc., Ocean Systems Division (Gould), in comments filed as an interested party to Aerojet's protest, challenges the Navy's determination that its bid was nonresponsive and also questions the propriety of the Navy's completion of the acquisition by negotiation.

We sustain Aerojet's protest, and dismiss Gould's protest.

Under the first step of this solicitation, Aerojet, Gould and Frequency Engineering Laboratories (FEL) were determined to have submitted acceptable technical proposals and were requested to submit bids under the invitation for bids (IFB). The IFB called for a firm Fiscal Year (FY) 1985 quantity of 524 units. The IFB also called for optional quantities for FY 1986 and FY 1987. The quantities were solicited in "stepladder" quantities of 500, 600 and 745 for FY 1986 and 500, 600 and 700 for FY 1987. Under the IFB, the lowest priced bidder was to be determined by adding the base year price and the price bid on the highest stepladder quantity under each option year.

In response to the IFB, the bidders submitted a base-year price and a separate price for each of the stepladder quantities established for the option years. Aerojet inserted additional pages to the schedule to show the different option prices for the 500, 600 and 700 quantities in FY 1987 depending on which stepladder quantities had been exercised in FY 1986.

The Navy determined that Aerojet's bid was nonresponsive because Aerojet conditioned its prices for FY 1987 option quantities on the exercise of various option quantities in FY 1986, and that Aerojet improperly omitted

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<sup>1/</sup> Aerojet contends that the evaluation criteria under the amended solicitation is "arbitrary and irrational" in that it gives the unit prices bid for the 1987 option three times the weight of the unit prices bid for the basic quantity and the Fiscal Year (FY) 1986 option. However, this allegation has been rendered academic by an amendment to the solicitation issued after the protest. This amendment, which the protester has not challenged, revised the evaluation factors to provide that the price bid for the FY 1987 option year quantities "will not inordinately outweigh" the price bid for the basic quantity and FY 1986 option buy.

from its bid one item for delivery of certain engineering data. FEL and Gould were determined nonresponsive because of their failure to indicate whether they intended to use government property.

The contracting officer canceled the IFB because he determined that all of the bids received were nonresponsive. The contracting officer also determined, pursuant to Federal Acquisition Regulation (FAR) § 15.103 (Federal Acquisition Circular (FAC) 84-5, April 1, 1985), that it was proper to complete the acquisition by using negotiation procedures without issuing a new solicitation.

Aerojet contends that, by the terms of the solicitation and applicable FAR provisions, it properly could condition its FY 1987 option prices on the exercise of the FY 1986 option. Aerojet points out that FAR § 17.204(c) states that an option period should provide adequate lead time to the contractor to ensure continuous production which Aerojet alleges would not occur if there was no production during the second year. Moreover, Aerojet contends that no purchase of units during the second year, followed by an attempt to order units for year 3, would be inconsistent with the delivery schedule set out in the IFB.

We find Aerojet's argument persuasive. A bidder logically would conclude from reading the IFB that both options would have to be exercised sequentially. The schedule for the basic quantity provides for delivery of quantities through June 1988. Under the FY 1987 option, deliveries begin in the Fall of 1989. Thus, if the FY 1986 option was not exercised, there would be a gap in deliveries of over 12 months. In our view, it is unreasonable to conclude from the solicitation that the Navy would exercise the FY 1987 option without first exercising the FY 1986 option. The Navy's position appears to be inconsistent with the FAR statement that option periods should provide adequate lead time for continuous production. Our view is confirmed by the Navy's subsequent amendment to the solicitation which makes the exercise of the FY 1986 option a prerequisite to the exercise of the FY 1987 option.

The contracting officer also determined Aerojet nonresponsive because Aerojet's bid allegedly failed to bind Aerojet to deliver data concerning engineering services to be performed by the contractor. Under the IFB, the price

for the data was to be included in the price for engineering services. The data delivery requirement was deleted by amendment 0006 to the IFB. The Navy apparently inadvertently deleted the item. The Navy issued amendment 0007 which stated, in pertinent part, that "Contract Line Item . . . [for data] was deleted in error in Amendment 0006 and is hereby reinstated."

Aerojet acknowledged Amendments 0006 and 0007. However, in the schedule where the data delivery item appeared, the line item was crossed out. Next to the item is a notation in the margin "A0006." The Navy determined that the bid did not indicate clearly Aerojet's recognition that the item had been reinstated and concluded that the bid was also nonresponsive on this basis.

A bid must be given a reasonable interpretation and read in its entirety. See James S. Jackson Co., Inc., B-211741, 83-2 C.P.D. ¶ 84. Here, Aerojet acknowledged amendment 0007 which unequivocally reinstated the data requirement. Also, the crossing out of the item was accompanied by a notation which in effect indicated it was "crossed out," that is, deleted, because of amendment 0006. Under these circumstances, we find Aerojet's bid showed Aerojet's intent to be bound to supply the data requirement, and was responsive with regard to this item.

Thus, we find that the Navy was incorrect in its determination that Aerojet's bid was nonresponsive.

We note that Gould, in its filing of September 17, 1985, as an interested party to Aerojet's protest, argues that the Navy also improperly determined that Gould's bid was nonresponsive. Gould's bid was determined to be nonresponsive for failure to submit required information regarding the use and rental value of government production and research property. However, the record shows that on August 22, 1985, Gould was advised of the rejection of its bid as nonresponsive, and the basis for the rejection.

Our Bid Protest Procedures, 4 C.F.R. § 21.2(a)(2) (1985), provide that protests shall be filed not later than 10 days after the basis of a protest is known or should have been known, whichever is earlier. Since Gould did not

protest the Navy's determination that its bid was nonresponsive within the prescribed 10-day period, any comments by Gould concerning its responsiveness are untimely.

Ordinarily, under these circumstances, we would recommend the Navy consider an award to Aerojet. However, the Navy asserts that, even if we find Aerojet's bid was responsive, it had an independent basis for cancellation. The Navy advises that the manufacturer of the battery for the mine which is a significant part of the procurement has advised the Navy that it is having difficulties in the production of the battery. As a result, on the resolicitation, the Navy omitted the requirement for pricing battery items. The Navy states that if award were required under the original solicitation, it would be receiving supplies of doubtful usefulness and require the contractor to subcontract with a producer which concedes it is having battery production problems. The Navy also states it is reviewing its needs to determine if another battery can be used.

Thus, the agency advises that the original solicitation no longer accurately reflects its needs since it would result in the purchase of potentially defective batteries, the power unit of the mine. While Aerojet contends that the problems with the required batteries are an acceptable risk which a responsible contractor reasonably could anticipate under the contract, and that Aerojet is willing to accept the risk of the batteries nonperformance, we agree with the Navy that it has the right to revise the solicitation to preclude the purchase of nonfunctioning batteries and to permit the Navy to find alternate acceptable batteries. Since award under the original solicitation would provide no assurance of performance in accordance with the Navy's actual needs, cancellation of the solicitation is proper on this basis. PetroElec Construction Co., Inc., B-216932, Mar. 27, 1985, 85-1 C.P.D. ¶ 356.

We also note that the Navy has amended the solicitation to change the evaluation criteria in certain respects. The amendments are designed to protect the government from receiving skewed bids, which may result if only one of the stepladder option quantities are evaluated as provided under the IFB. See Telex Communication, Inc., B-211236, July 25, 1983, 83-2 C.P.D. ¶ 122. In view of our conclusion above,

we do not consider whether this change itself constitutes adequate justification for a resolicitation.

The contracting officer's decision to cancel the second step and subsequently complete the acquisition by negotiation was based on the contracting officer's finding that there were no responsive bids under the IFB. As the protester points out, the FAR permits the contracting officer to cancel an IFB and to complete the acquisition through negotiation without issuance of a new solicitation where no responsive bids are received. FAR §§ 14.404-1(c)(6) and 14.404-1(e) (FAC 84-5, April 1, 1985). Since we find that Aerojet's bid was responsive, the contracting officer's justification for conducting a negotiated acquisition is no longer applicable. Under the circumstances the Navy should make a determination concerning the resolicitation consistent with the provisions of FAR.

We sustain Aerojet's protest and dismiss Gould's protest.

*Harry R. Van Cleve*

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General Counsel